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In the Supreme Court of the United States

OCTOBER TERM, 1974

THE NATIONAL LEAGUE OF CITIES, ET AL., APPELLANTS

v.

PETER J. BRENNAN, SECRETARY OF LABOR

THE STATE OF CALIFORNIA, APPELLANT

v.

PETER J. BRENNAN, SECRETARY OF LABOR

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

ROBERT H. BORK,
Solicitor General,
ALLAN ABBOT TUTTLE,
Assistant to the Solicitor General,
Department of Justice,
Washington, D.C. 20530.

WILLIAM J. KILBERG,
Solicitor of Labor,
CARIN ANN CLAUSS,
Associate Solicitor,
JACOB I. KARRO,
DARRYL J. ANDERSON,
Attorneys,
Department of Labor,
Washington, D.C. 20210.

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the appellee moves to affirm the judgment of the three-judge district court on the ground that the issues raised by appellants were conclusively decided by this Court in *Maryland* v. *Wirtz,* 392 U.S. 183.

JURISDICTION

This action seeks to enjoin, as unconstitutional, enforcement of the 1974 amendments to the Fair Labor Standards Act of 1938 (P.L. 93–259, 88 Stat. 55, amending 29 U.S.C. 201, *et seq.*), insofar as those amendments apply to State and local governments. It was filed on December 12, 1974, and assigned to a three-judge district court pursuant to 28 U.S.C. 2284. The judgment of the three-judge district court granting appellee's motion for summary judgment was entered on December 31, 1974. The notice of appeal of appellants National League of Cities, *et al.*, was filed on December 31, 1974, and their application for a stay pending the appeal was granted that same day by an interim order of the Chief Justice. The stay was continued by this Court on January 13, 1975, on condition that appellants National League of Cities, *et al.* file their jurisdictional statement on or before January 17, 1975. The jurisdictional statement of appellants National League of Cities, *et al.* was filed on January 17, 1975.

The notice of appeal of the State of California was filed on January 8, 1975. Their jurisdictional statement was filed on January 17, 1975.

The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

QUESTION PRESENTED

In *Maryland* v. *Wirtz*, 392 U.S. 183, this Court sustained, against constitutional challenges, the 1966 amendments to the Fair Labor Standards Act of 1938 (Act), 80 Stat. 830, which extended the Act's

basic wage and hour standards to 2.9 million public school, hospital and transit employees. The 1974 amendments to the Act, 88 Stat. 55, extend the Act's basic wage and hour standards to an additional 3.4 million employees of the several States and their political subdivisions.

The question is whether the 1974 amendments exceeded Congress' power under the Commerce Clause.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitution of the United States provides in pertinent part:

Article I, Section 8:

The Congress shall have Power * * *

* * * * *

To regulate Commerce * * * among the several States * * *;

Article VI:

* * * * *

This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land * * *.

Tenth Amendment:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Eleventh Amendment:

The Judicial power of the United States shall not be construed to extend to any suit in law

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> or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Fair Labor Standards Amendments of 1974 are set forth as Appendix B to the Jurisdictional Statement of appellants National League of Cities, *et al.* (J.S. App. 1b–21b).[1]

STATEMENT

The Fair Labor Standards Act, as originally enacted in 1938, required employers covered by the Act to pay those of their employees who were engaged in commerce or in the production of goods for commerce a minimum wage, as well as one and one-half times their regular rate of pay for hours worked in excess of 40 a week; to keep records necessary or appropriate for the enforcement of the Act; and to comply with certain child labor standards (29 U.S.C. (1940 ed), 206(a), 207(a) and (b), 211(c), 212). The States and their political subdivisions were specifically excluded from the Act's coverage (29 U.S.C. (1940 ed.) 203(d)).

In 1961, Congress extended the coverage of the Act, beyond employees themselves engaged in commerce or in the production of goods for commerce, to all employees of certain "enterprises" which had some employees so engaged (29 U.S.C. (1964 ed.) 203(r), 203(s), 206(b), 207(a)(2)). The States and their political subdivisions remained among the employers specifically excluded from the Act's coverage (29 U.S.C. (1964 ed.) 203(d)).

[1] "J.S." refers to the Jurisdictional Statement in No. 74–878, filed by the National League of Cities, *et al.*; "Calif. J.S." refers to the Jurisdictional Statement in No. 74–879, filed by the State of California.

In 1966, Congress extended the Act's coverage (including the prohibition against sex-based wage differentials added by the Equal Pay Act of 1963) to 2.9 million employees of State and other public enterprises engaged in operating transit companies, hospitals, schools, and related institutions (29 U.S.C. (1970 ed.) 203(d), 203(r)(1) and (2), 203(s)(1) and (4), 206(d)). Except to this extent, "any State or political subdivision of a State" was excluded from the Act's definition of an "Employer" (29 U.S.C. (1970 ed.) 203(d)). The constitutionality of this extension of the Act's provisions to the States and their political subdivisions was upheld in *Maryland* v. *Wirtz*, 392 U.S. 183.

In 1974 Congress amended the Act[2] to cover an additional 3,386,000 employees of the States and their political subdivisions.[3] This extension of coverage was

[2] The 1974 amendments became effective on May 1, 1974. The overtime provisions for employees engaged in fire protection and law enforcement activities did not, however, become effective until January 1, 1975.

The 1974 amendments also extended the provisions of the Age Discrimination in Employment Act of 1967 to all State and local government employees, except those who are elected or appointed by elected officials to their personal staffs or to policy making positions.

[3] S. Rep. No. 93–690, 93d Cong., 2d Sess., p. 16. Appellants incorrectly state that the 1974 amendments extend the Act to 11.4 million nonsupervisory State and local government employees (J.S. 5, 20). The 11.4 million figure is the total employ-

accomplished by removing the exclusionary language from the Act's definition of "Employer" and by adding to it the phrase "public agency" (29 U.S.C. 203 (d); J.S. App. 4b). "Public agency" in turn was defined to include "the government of a State or political subdivision thereof" (29 U.S.C. 203(x); J.S. App. 5b). The definition of an "Enterprise engaged in commerce or in the production of goods for commerce" was amended to include "an activity of a public agency" (29 U.S.C. 203(s); J.S. App. 5b). That amendment continues (*ibid.*):

> The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.

In addition to the Act's general exemption from coverage of "executive, administrative or professional" personnel (29) U.S.C. 213(a)(1)), the 1974

ment of State and local governments, including supervisory employees and others within the Act's several exemptions as well as employees already covered under preexisting law held constitutional in *Maryland* v. *Wirtz*, *supra*. Thus, of the 11.4 million employees, 6.9 million are employed by schools, hospitals and transit companies and therefore are covered (except 4.0 million who are exempt) without regard to the 1974 amendments. Of the remaining 4.5 million, 3.4 million were brought under the Act by the 1974 amendments, the others being exempt (*e.g.*, as supervisory or professional employees, or as employees of certain seasonal recreational establishments). See U.S. Department of Commerce, Bureau of Census, *Public Employment in 1973*, p. 9.

amendments specifically exclude from coverage any individual who "holds a public elective office" or is appointed by such an officeholder to be a "member of his personal staff" or "to serve on a policymaking level," or to advise the officeholder "with respect to the constitutional or legal powers of his office" (29 U.S.C. 203(e)(2)(C); J.S. App. 4b).

The Act's minimum wage and overtime requirements, which are generally lower than those for private employers, are self-executing and do not depend upon the prior issuance of any rules or regulations (29 U.S.C. 206(b), 207(k), 213(b)(20); J.S. App. 1b, 5b, 6b). The Secretary is not authorized to add any additional requirements not already applicable to private employers.[4]

On December 12, 1974, appellants National League of Cities, *et al.*, sued in the United States District

[4] The "800 pages of Regulations" referred to by appellants (J.S. 8) are a codification of pertinent Federal Register documents relating to several different programs of various agencies (29 C.F.R. Parts 500 to 1899). Only some of the documents relate to the statutes here in question (the Fair Labor Standards and Age Discrimination in Employment Acts) and, of these, only a small part, as appellants themselves concede, even remotely concerns the States and local governments. Moreover, with the exception of the Department of Labor's regulations on recordkeeping and hazardous child labor, its rulings and interpretations do not impose additional requirements on employers, as mistakenly assumed by the court below. Instead, they implement (in the case of the exemption for executive, administrative and professional employees) or explain (in the case of the Act's overtime exemptions, including the partial exemption provided by Section 7(k) for fire protection and law enforcement personnel) sections of the Act which, if invoked, would relieve employers from certain of the Act's requirements.

Court for the District of Columbia to enjoin the enforcement of the 1974 amendments insofar as they apply to States and local governments.[5] A three-judge district court was convened and, on December 30, 1974, heard oral argument on appellants' motion for preliminary relief and appellee's motion to dismiss.[6] The court granted appellee's motion on December 31, 1974, on the ground that this case "is controlled by the

[5] Appellants seek not only to enjoin the application of the Act to employees not previously covered, but also to enjoin application of the new minimum wage rates for employees who were first covered by the 1966 a' ·endments upheld in *Maryland* v. *Wirtz*, *supra*. That these previously covered employees need the protection of the new minimum wage rates ($1.90 until January 1, 1975, and $2.00 thereafter) is clear from a 1973 report prepared for Congress which showed that 314,000 of the 2.9 million public employees covered by the 1966 amendments were paid less than $1.80 in September 1973 (Background Material on the Fair Labor Standards Act Amendments of 1973, 93d Cong., 1st Sess., p. 220).

[6] The court held no evidentiary hearing and made no factual findings. The court's comments on what it erroneously assumed to be regulations and on dollar impact, as well as on the nature of the activities covered by the 1974 amendments (J.S. App. 7a) are simply a repetition of appellants' allegations and are in no sense evidentiary findings. The allegations were not documented by economic or other objective evidence.

Appellants offered no testimony at the argument on December 30, 1974, nor did they request an evidentiary hearing. The government offered two depositions demonstrating that the officers of the two national organizations who verified the complaint did not have knowledge of facts to support the claims of impact. The matters considered by the Court included the two depositions; two affidavits of Jack I. Karlin of the Labor Department, and other exhibits, among which were letters from states and localities which the persons who verified the complaint could not amplify or explain.

decision of the Supreme Court in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968)" (J.S. App. 6a).

ARGUMENT

The issues raised by appellants were all resolved by this Court only six years ago, with respect to the same statute, in *Maryland* v. *Wirtz*, 392 U.S. 183; there are no significant differences between this case and *Maryland*; and *Maryland* itself is soundly based on an unbroken line of Commerce Clause decisions.

Appellants claim that the 1974 amendments are a "seizure of control over nearly all State and City employees" and "the take-over of 80 to 85% of State and City budgets" (J.S. 9, 10). As this Court noted in *Maryland* v. *Wirtz*, in rejecting a similar contention, "[s]ince the argument is made in terms of interference with 'sovereign state functions,' it is important to note exactly what the Act does" (392 U.S. at 193). In *Maryland*, this Court found the contention "not factually accurate," since "Congress has 'interfered with' these state functions only to the extent of providing that when a State employs people in performing such functions it is subject to the same restrictions as a wide range of other employers whose activities affect commerce * * *" (392 U.S. at 193–194). Appellants' claims similarly are "not factually accurate"; the present Act, like the 1966 Act, interferes with state and city functions only to the extent that it requires "a minimum wage and maximum limit of hours unless overtime wages are paid, and does not otherwise affect the way in which * * * duties are performed" (392 U.S. at 193).

We will first demonstrate that the State and local government functions covered by the 1974 amendments affect commerce in the same way that the activities covered by the 1966 amendments were found by this Court to affect commerce. Secondly, we show that, under *Maryland* v. *Wirtz*, State and local government functions, such as those affected by the 1974 amendments, are not immune from congressional regulation.

A. THE COVERED ACTIVITIES OF STATE AND LOCAL GOVERNMENTS AFFECT COMMERCE

1. The 1966 amendments to the Fair Labor Standards Act extended the Act's wage and hour standards to cover 2.9 million public school, hospital and transit workers. This Court, in *Maryland* v. *Wirtz*, stated, "[i]t is clear that labor conditions in schools and hospitals can affect commerce" (392 U.S. at 194). The Court noted the billions of dollars spent on education and the millions of dollars of interstate purchases (*ibid.*). The Court added that "[s]trikes and work stoppages involving employees of schools and hospitals, events which unfortunately are not infrequent, obviously interrupt and burden this flow of goods across state lines" (392 U.S. at 195; footnote omitted). From this, the Court concluded, "[i]t is therefore clear that a 'rational basis' exists for congressional action prescribing minimum labor standards for schools and hospitals, as for other importing enterprises" (392 U.S. at 195).[7]

[7] The Court added the following footnote (*ibid.*):

"[26] Both under the present Act and the National Labor Relations Act, numerous cases have held that the engagement of an enterprise in interstate commerce may consist of importation. *E.g.*, *Wirtz* v. *Hardin & Co.*, 253 F. Supp. 579, aff'd, 359 F. 2d 792 (FLSA); *N.L.R.B.* v. *Baker Hotel*, 311 F. 2d 528 (NLRA)."

Appellants attempt to distinguish *Maryland* v. *Wirtz* by contending that the public agencies covered by the 1974 amendments—unlike those covered by the 1966 amendments—are not in competition with the private sector (J.S. 12–14, 22, 24, 28). But even if this were so (which has not been established, *infra*, pp. 14–15), this Court's finding of a rational basis for congressional action in *Maryland* v. *Wirtz* was not based upon the existence of competition between public and private employers. The finding of an effect upon commerce rested upon the large commitment of funds to the covered enterprises, their substantial importation of goods, and the effect of their labor disputes upon the flow of such goods.

All of these considerations apply with even greater force to the State and local government functions covered by the 1974 amendments. As the district court noted, these agencies "make substantial purchases in interstate commerce of equipment and other goods" (J.S. App. 7a). Indeed, in 1971 State and local governments made purchases of 135 billion dollars (119 Cong. Rec. S14057 (daily ed., July 19, 1973)).[8] The

[8] Another measure of the involvement of State and local government agencies in commerce is the flow of federal funds. "In 1975, Federal aid to State and local governments is expected to total $52.0 billion * * *." Executive Office of the President, Office of Management and Budget, *Special Analyses, Budget of the United States Government*, p. 203 (Washington, D.C., 1974). "In total, Federal aid will finance about 22% of State and local expenditures in 1975" (*id.* at 205).

Senate Report on the 1974 amendments states (S. Rep. No. 93–690, 93d Cong., 2d Sess., p. 24):

> The Committee believes that there is no doubt that the activities of public sector employers affect interstate commerce and therefore that the Congress may regulate them pursuant to its power to regulate interstate commerce. Without question, the activities of government at all levels affect commerce. Governments purchase goods and services on the open market, they collect taxes and spend money for a variety of purposes. In addition, the salaries they pay their employees have an impact both on local economies and on the economy of the nation as a whole. The Committee finds that the volume of wages paid to government employees and the activities and magnitude of all levels of government have an effect on commerce as well.

There is no question that labor disputes involving public agencies affect the flow of commerce. Congress' finding in 1938 that substandard labor conditions "lead * * * to labor disputes burdening and obstructing commerce and the free flow of goods in commerce" (29 U.S.C. 202(a)(4)) is equally applicable to the public agencies covered by the 1974 amendments. In considering the 1974 amendments Congress had before it evidence of the existence of substandard labor conditions in State and local governments. An estimated 409,000 State and local government employees were paid less than $1.90 an hour in 1973 [9]—at a time when

[9] The 409,000 figure is reached by adding to the 314,000 employees covered by the 1966 amendments, earning less than $1.80 an hour in September 1973, the 95,000 employees that

the poverty level income for an urban family of four was $4,540 or approximately $2.27 an hour.[10] Ten percent of the nonsupervisory State and local government employees (including 20 percent of the police and fire employees) worked more than 40 hours a week.[11]

Moreover, there is no doubt that labor conditions in public agencies other than schools and hospitals had led to strikes and work stoppages that burdened interstate commerce. During the hearings on these amendments, there was testimony concerning the growing frequency of labor disputes and strikes among public employees.[12] In 1970, excluding educational institutions and State agencies, there were 197 work stoppages by local government employees, resulting in a loss of 289,300 man-days of work. Burton and Krider, *The Incidence of Strikes in Public Employment,* Conference on Labor in Nonprofit Industry and Government, Princeton University (May 1973), Table 3, p. 6. There were 409 work stoppages among all categories of State and local government employees,

Congress proposed to cover additionally when the minimum was raised to $1.90 an hour. See, Background Material on the Fair Labor Standards Act Amendments of 1973, 93d Cong., 1st Sess., p. 220; H. Rep. No. 93–913, 93d Cong., 2d Sess., p. 28.

[10] S. Rep. No. 93–690, *supra*, at p. 8.

[11] H. Rep. No. 93–913, *supra*, at p. 29.

[12] Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, on S. 1861 and S. 2296, 92d Cong., 1st Sess., p. 366; Hearings before the General Subcommittee on Labor of the House Committee on Education and Labor, on H.R. 10498 and H.R. 17596, 91st Cong., 2d Sess., pp. 53, 59; 120 Cong. Rec. S2518 (daily ed., February 28, 1974) (Statement by Senator Javits).

resulting in a loss of 1,375,100 man-days of work (*id.* at Table 2, p. 4). See also White, "Work Stoppages of Government Employees," *Monthly Labor Review* (December 1969), pp. 29–34; University of California Institute of Government Studies, *Strikes by Public Employees and Professional Personnel: A Bibliography* (June 1967).

2. Even assuming that competition between public and private enterprises was relevant to the Court's analysis of the effect of the covered activities on interstate commerce in *Maryland* v. *Wirtz* (see J.S. 12–14), it is apparent that a large number of the public employees brought within the Act by the 1974 amendments are engaged in activities which compete as much with the private sector as do the schools and hospitals which this Court considered in that case. These employees work for gas and electric companies, recreation facilities, trash collection agencies, airports, liquor stores, libraries, and the like—all of which, in the absence of the 1974 amendments, would have a competitive advantage.[13] *Public Employment in 1973, supra,* at p. 9. These newly covered public employees are, moveover, employed in the same kinds of occupations as covered employees in the private sector: *e.g.,* custodial workers, dock sweepers, laborers, groundkeepers, laundry workers, cooks, food service workers, elevator operators, bridge tenders, library

[13] See, *e.g., Shultz* v. *Instant Handling, Inc.*, 418 F. 2d 1019 (C.A. 5) (trash removal company); *General Electric Co.* v. *Porter*, 208 F. 2d 805 (C.A. 9) (fire protection company). Some municipalities contract with private companies to perform their fire protection services.

aides, home service aides, community workers, farm and dairy hands, messengers, building guides, etc. *Nonsupervisory Employees in State & Local Governments,* U.S. Department of Labor, Workplace Standards Administration, 1971 Report to Congress, pp. 52–57.

3. California makes the additional argument that its employees are not "engaged in commerce or in the production of goods for commerce" because their "activities * * * are purely intrastate in nature" (Calif. J.S. 13), citing *Kirschbaum Co* v. *Walling,* 316 U.S. 517, and *Walling* v. *Jacksonville Paper Co.,* 317 U.S. 564. These cases, however, were decided before the Act's original coverage provisions[14] were broadened by the 1961, 1966 and 1974 amendments to cover not only those employees who are themselves engaged in commerce but also those employees who are employed in an enterprise which has a prescribed relationship to interstate commerce. As this Court explained the expanded coverage of the Act in *Brennan* v. *Arnheim & Neely, Inc.,* 410 U.S. 512, 516–517:

> The concept of "enterprise" under the Fair Labor Standards Act * * * substantially broadened the coverage of the Act. Rather than confining the protections of the Act to employees who were themselves "engaged in commerce or in the production of goods for commerce" [citations omitted], the new amendments brought those "employed in an enterprise

[14] These original coverage provisions were "not coextensive with the limits of the power of Congress over commerce" (*Kirschblaum Co., supra,* 316 U.S. at 523).

> engaged in commerce" within the ambit of the minimum wage and maximum hours provisions.

To be covered, an "enterprise" need not itself engage in the production of goods for commerce or perform any activities of a business nature; it may receive, handle and consume such goods.[15] As Congress noted, the "demand for a product causes its interstate movement quite as surely as does production" (see 107 Cong. Rec. 6236), and the resulting consumption of goods is an important factor in maintaining the flow of goods. See S. Rep. No. 87–145, 87th Cong., 1st Sess., p. 3; H. Rep. No. 87–75, 87th Congress, 1st Sess., p. 3. The federal commerce power "is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end * * *." *United States* v. *Darby,* 312 U.S. 100, 118.

[15] The Act has always applied to non-business and non-profit activities, including those which are governmental in nature. See, *e.g., Powell* v. *U.S. Cartridge Co.*, 339 U.S. 497 (employees producing war materials at a government-owned plant); *Mitchell* v. *Pilgrim Holiness Church Corp.*, 210 F. 2d 879 (C.A. 7), certiorari denied, 347 U.S. 1013 (employees of a church who were engaged in printing religious materials); and *Public Building Authority of Birmingham* v. *Goldberg*, 298 F. 2d 367 (C.A. 5) (government employees engaged in processing claims for the payment of Social Security benefits were engaged in consumer-related activities). See also *National Labor Relations Board* v. *Central Disp. & E. Hosp.*, 145 F. 2d 852 (C.A.D.C.), certiorari denied, 324 U.S. 847, holding that the National Labor Relations Act, as then worded, applied to a non-profit charitable hospital.

B. THE EXTENSION OF THE FAIR LABOR STANDARDS ACT TO PUBLIC AGENCIES IS A VALID EXERCISE OF THE COMMERCE POWER AND DOES NOT VIOLATE THE TENTH AMENDMENT

1. In asserting that the 1974 amendments are an unconstitutional "take-over" of State and local government budgets and personnel (J.S. 5, 10), appellants advance an argument decisively rejected by this Court in *Maryland* v. *Wirtz, supra.* There too, the appellants argued that the extention of coverage to public schools and hospitals presaged "the utter destruction of the State as a sovereign political entity" (Brief for Appellants, No. 742, O.T. 1967, p. 10). As we have seen (*supra,* p. 9), the Court found that these alarms were not "factually accurate." We shall show (*infra,* pp. 19–25) that appellants' contentions here are similarly factually inaccurate. But it is important to note at the outset that *Maryland* v. *Wirtz* decisively disposed of the claim that the "[commerce] power must yield to state sovereignty in the performance of governmental functions" (392 U.S. at 195). The Court held that:

> it will not carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses, simply because those enterprises happen to be run by the States for the benefit of their citizens. [392 U.S. at 198–199.]

Similarly, the Court noted that "valid general regulations of commerce do not cease to be regulations of commerce because a State is involved" (392 U.S. at 196–197).

These observations in *Maryland* v. *Wirtz* reflect the uniform decisions of this Court that Congress may regulate State activities that have a substantial effect upon commerce. Two examples cited in *Maryland* will suffice. In *Sanitary District* v. *United States*, 266 U.S. 405, the United States sued to enjoin the diversion of water from Lake Michigan to dispose of sewage from Chicago, claiming that the diversion conflicted with the power of the United States to regulate interstate commerce. The Court stated (266 U.S. at 426) that the power and authority of the United States to remove obstructions to interstate and foreign commerce was, without question, "superior to that of the States to provide for the welfare or necessities of their inhabitants." Similarly, in *United States* v. *California*, 297 U.S. 175, the Court upheld the application of the federal Safety Appliance Act to a wholly intrastate non-profit railroad operated by California to facilitate transportation to a port. The Court said (297 U.S. at 185):

> * * * [W]e look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.

Although appellants contend that the 1974 amendments interfere with "essential Government services" and "unique sovereign governmental functions" (J.S. 14, 15), *Maryland* v. *Wirtz* established "that the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character" (392 U.S. at 195). The schools and hospitals covered by the 1966 amendments were as much "essential Government services" as any of the public agencies covered by the 1974 amendments.[16] The statement in *Maryland* that the characterization of an activity as "governmental" does not affect Congress' power followed established constitutional doctrine. Thus, although the State activities in the California railroad case were of a commercial nature, the Court deemed it "unimportant to say whether the state conducts its railroad in its 'sovereign' or in its 'private' capacity" (*United States* v. *California*, *supra*, 297 U.S. at 183). In *Sanitary District*, *supra*, the disposal of Chicago's sewage was not a commercial function, but a governmental health measure.

2. Rather than constituting a "take-over" of State and local government budgets and personnel, as appellants contend (J.S. 5, 10), the 1974 amendments extend the Act's coverage to the same type of employees as were initially covered by the 1966 amend-

[16] Cf. *Employees* v. *Missouri Public Health Department*, 411 U.S. 279, 296 (Marshall, J., concurring in the result). The opinion of the Court in that case (411 U.S. at 284) distinguished *Parden* v. *Terminal R. Co.*, 377 U.S. 184, by stating that "*Parden* was in the area where private persons and corporations normally ran the enterprise," whereas, in the case of State mental hospitals, "the public sector took over." The Court said:

"State mental hospitals, state cancer hospitals, and training schools for delinquent girls which are not operated for profit are not proprietary."

ments: *viz.,* non-supervisory civil service employees who are neither elected nor appointed to policymaking positions or to the personal staffs of elected officials. The 1974 extension, like that of 1966, "establishes only a minimum wage and maximum limit of hours unless overtime wages are paid" (*Maryland* v. *Wirtz, supra,* 392 U.S. at 193). Like the 1966 Act, the 1974 Act "does not otherwise affect the way in which * * * [public agencies'] duties are performed" (*ibid.*).

Appellants err in contending that the 1974 amendments would require that "public employees * * * all work for the same pay and under precisely the same conditions" (J.S. 17). The minimum wage requirements do nothing more than set a floor below which wages may not fall; they require only that the wage be at least $1.90 (now $2.00) an hour. Even this minimum obligation does not affect all public employees, but only the relatively small number (approximately 3.6 percent) that was being paid less than the specified minimum (*supra,* pp. 12–13).[17] Indeed, most of

[17] Appellants err in stating that "[t]he Act was made applicable to States and Cities under false representations in congressional reports that it would have no significant impact upon States and Cities since the pay they provide exceeds the minimum wages required by the Act" (J.S. 8). The language quoted by appellants from the House Report merely stated that the wage levels for the State and local government employees who were to be covered by the proposed amendments were generally higher than the wage levels for the State and local government employees who were covered by the 1966 amendments. H. Rep. No. 93–913, 93d Cong., 2d Sess., pp. 28–29.

these employees (an estimated 314,000 out 409,000) are among those who were first covered by the 1966 amendments.[18]

Nor do the Act's overtime requirements "determine * * * what hours may be worked by employees of State and City Governments" (J.S. 16). The only restriction—which is the same restriction as that of the 1966 amendments—is that, except where an overtime pay exemption is provided, the employer must pay a premium rate for the hours worked in excess of 40. This premium rate can be avoided if the employer uses new employees to do the overtime work. This, in effect, tends to discourage overtime work and to spread employment, which is the result Congress intended. *Walling* v. *Helmerich & Payne,* 323 U.S. 37, 42; *Walling* v. *Youngerman-Reynolds Hardwood Co.,* 325 U.S. 419, 423–424.

While appellants object to this interference with their practice of using full-time workers in various government jobs (J.S. 6, referring to Complaint ¶¶ 29 and 46), the spreading of employment is no less valid an objective of national labor policy in the sector of public employment than in the sector of private employment, as Congress noted. S. Rep. No. 89–1487, 89th Cong., 2d Sess., p. 22; H. Rep. No. 89–871, 89th

[18] In this respect, the 1974 amendments are quite different in their impact from the Economic Stablization Act of 1970 (84 Stat. 799, now repealed), which imposed controls on the wages of *all* State and local government employees, and not just on those few who were paid less than a minimum living wage. See *Fry* v. *United States,* No. 73–822, pending decision of this Court; see also *Coan* v. *California,* 113 Cal. Rptr. 187, 203, (Sup. Ct.), 520 P.2d 1003, 1019 (dissenting opinion).

Cong., 1st Sess., pp. 30–31; Background Material on the Fair Labor Standards Act Amendments of 1973, *supra,* at p. 298; 112 Cong. Rec. 11282, 11284, 20481, 22652. In any event, as the Court said with respect to a similar complaint about the overtime provisions of the 1966 amendments, these "are matters outside the judicial cognizance" (*Maryland* v. *Wirtz, supra,* 392 U.S. at 194, n. 22).

Also, contrary to appellants' assertion (J.S. 7, 10), the minimum wage and overtime requirements of the 1974 amendments are not a "take-over of 80 to 85% of State and City budgets." The increased costs of these requirements (assuming that employment is not spread to avoid overtime) will amount to less than two percent of the total wage costs.[19] These wage costs

[19] For example, an increase in the minimum wage to $1.80 in 1973 would have cost the State and local governments an estimated $128 million a year, which represented an increase of only 0.3 percent in their total wage bill. Background Material on the Fair Labor Standards Act Amendments of 1973, 93d Cong., 1st Sess., p. 220. The estimated increase for overtime compensation was 1.0 percent, but in actual effect it would be less since more than 40 percent of the employees are already entitled to premium overtime pay under State or local laws or ordinances. H. Rep. No. 93–913, 93d Cong., 2d Sess., pp. 28–29; *Nonsupervisory Employees in State & Local Governments, supra,* at pp. 25 and A–46, Table 44. Appellants' cost figures (J.S. 7) are only stated in dollar amounts and do not show the percentage by which their wage costs would be increased. Moreover, 80 percent of their $200 million estimate for fire departments is based on the explicit assumption that numerous local governments will fail to take advantage of the partial overtime exemption provided by Section 7(k) of the Act. See Letter from William F. Danielson, Director of Personnel, City of Sacramento, to Charles S. Rhyne, dated December 24, 1974, and the two affidavits prepared by appellee's Director of the Branch of Evaluation and Research, Mr. Jack I. Karlin. The actual cost of the partial application of the Act's overtime requirement to fire departments (assuming that all the jurisdictions take advantage of the Section 7(k) exemption) is, according to appellants' own figures $30,499,000 (Danielson letter), which is not too different from the Department of Labor's estimate of $27,000,000 (29 C.F.R. Part 553; J.S. App. 2c).

are not, as California contends (Calif. J.S. 10), paid with funds raised entirely by local government. Federal aid, as already noted (*supra,* p. 11, n. 8), "will finance about 22% of State and local expenditures in 1975."

In any event the validity of the 1974 amendments is not affected because "[they] may place new * * * fiscal burdens on the States" (*Employees* v. *Missouri Public Health Department, supra,* 411 U.S. at 284). Such considerations "raise not constitutional issues, but questions of policy. They relate to the wisdom, need, and effectiveness of a particular project. They are therefore questions for the Congress, not the Courts" (*Oklahoma* v. *Guy F. Atkinson Co.,* 313 U.S. 508, 527). As this Court noted in *Sanitary District* v. *United States, supra,* 266 U.S. at 432, "* * * we are not at liberty to consider them here as against the edict of a paramount power."

Nor do the 1974 amendments authorize the issuance of any regulations which would impose *additional* requirements upon the State and local governments. None of the Department of Labor's regulations (see n. 4, p. 7, *supra*) prohibits the use of volunteers or requires that all training time be paid for (see J.S. 32). The Act does, of course, require employers to pay

for all required work, and this would include "training time" and "mutual aid" if such activities are required by the employer. On the other hand, if the mutual aid is performed voluntarily, individuals rendering such aid are not employees, but volunteers, and their hours need not be paid for.[20]

Finally, the additional provisions applicable to public police and fire agencies (29 U.S.C. 207(k); J.S. App. 5b–6b) do not add to the burden of compliance. They are designed to facilitate compliance. Thus, unlike private employers, these public agencies are authorized, at their option, to omit overtime pay for work between 40 and 60 hours in the workweek, or to substitute "compensatory time" for such hours, and even for work in excess of 60 hours in a particular week if the excess hours are balanced out by shorter

[20] Contrary to appellants' statement (J.S. 32), the Department of Labor does not take the position that the payment of a nominal sum converts a volunteer into an employee, since it assumes that such a sum would be in lieu of reimbursement (see 29 C.F.R. 553.11(a); J.S. App. 8c). In any event, the question whether an individual is an employee or a volunteer is ultimately one for the courts, and is not a matter for "final decision" (J.S. 21, n. 5) by either the Department or the employer. See, *e.g.*, *Walling* v. *Portland Terminal Co.*, 330 U.S. 148. Similarly, wages must be paid for training only if the training is required as a condition of employment, in which event the compensable time is limited to time spent in actual training. Other training which employees may take to improve their performance or to increase their opportunities for advancement does not constitute hours of work, and is not compensable, even if the public agency pays the tuition or other costs. See 29 C.F.R. 785.27–785.31; 29 C.F.R. 553.7; J.S. App. 7c.

work schedules in the four-week period.[21] See 29 C.F.R. 553.19; J.S. App. 11c–12c.[22]

3. The foregoing analysis is dispositive of appellants' Tenth Amendment claim. As this Court recog-

[21] With respect to overtime work for firemen, appellants acknowledge that 85% of the cities work their firemen 60 hours a week or less. Paragraph 44 of complaint, Danielson letter of December 24, 1974. Mr. Danielson also acknowledged in his letter that the other 15% of the cities are smaller cities. Thus, substantially more than 85% of the firemen already work 60 hours or less per week. Appellants' unsupported claims of cost should be viewed in the context of 85% of the cities managing to get by on working their firemen sixty hours per week or less.

[22] Appellants also stress the section of the interpretative regulations dealing with sleep and meal time (J.S. 21, n. 5), which represents the one departure from previous interpretations (29 C.F.R. 553.15; J.S. App. 10c). That section interprets Section 7(k), as precluding the deduction of on-duty sleep and meal time from hours worked when the employee is on duty for 24 hours or less, whereas the Department of Labor's prior position, which is applicable to employers generally (29 C.F.R. 785.20, 785.21, and 785.22), precludes the deduction of sleep and meal time only when the employee is on duty for less than 24 hours. In contrast to the regulation under Section 7(k), the general regulations permit exclusion of such time for full 24-hour shifts. In departing from this position on full 24-hour shifts in the case of fire and police agencies claiming the special exemption of Section 7(k), the Department was conforming to the explicit legislative history. The Conference Report states that that section, as amended in conference, "departs from the standard FLSA 'hours of work' concept directed primarily at industrial and agricultural occupations and adopts an overtime standard keyed to the length of the tours of duty, thereby reflecting the uniqueness of the firefighting service" (S. Rep. No. 93–758, 93d Cong., 2d Sess., p. 27). See also, 120 Cong. Rec. S4692 (daily ed., March 28, 1974).

nized in *United States* v. *Darby, supra,* 312 U.S. at 124:

> The amendment states but a truism that all is retained which has not been surrendered. * * * From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. * * *

The only limitation on the "granted power" over commerce is that the federal action must be rationally related to that power. "As long ago as *Sanitary District* v. *United States*, 266 U.S. 405, [this] Court put to rest the contention that state concerns might constitutionally 'outweigh' the importance of an otherwise valid federal statute regulating commerce" (*Maryland* v. *Wirtz, supra,* 392 U.S. at 195–196).[23]

CONCLUSION

Although appellants raise several constitutional questions, those questions have all been authoritatively settled in *Maryland* v. *Wirtz, supra,* and further ple-

[23] Appellants also rely on various decisions involving the federal taxing power and the States' immunity from suits brought by individual citizens (J.S. 30–31; Calif. J.S. 12–13). This Court, however, has repeatedly held that the various tests applied in the taxing cases, as well as under the Eleventh Amendment, are not applicable to the plenary power of Congress to regulate commerce. See *United States* v. *California, supra,* 297 U.S. at 184–185; *Case* v. *Bowles,* 327 U.S. 92, 101; *Employees* v. *Missouri Public Health Department,* 411 U.S. 279; *Edelman* v. *Jordan,* 415 U.S. 651.

nary consideration by this Court is thus unnecessary. The judgment of the district court should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

ALLAN ABBOT TUTTLE,
Assistant to the Solicitor General.

WILLIAM J. KILBERG,
Solicitor of Labor,

CARIN ANN CLAUSS,
Associate Solicitor,

JACOB I. KARRO,
DARRYL J. ANDERSON,
Attorneys,
Department of Labor.

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